

97-7164

No. _____

Supreme Court, U. S.
FILED

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In The
Supreme Court of the
United States

October Term, 1997

FRANCOIS HOLLOWAY, also
known as ABDU ALI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

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26 Pp (9)

Supreme Court of the United States

No. 97-7164

Francois Holloway, aka Abdu Ali,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 27, 1998

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ORIGINAL

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Francois Holloway a/k/a Abdu Ali, asks leave to file the attached petition for a writ of certiorari, without prepayment of costs and to proceed in forma pauperis. Petitioner has been granted leave to so proceed in both the United States District Court and the United States Court of Appeals. No affidavit is attached, inasmuch as the United States District Court appointed counsel for petitioner under the Criminal Justice Act of 1964.

David H. Secular
DAVID SECULAR, Of Counsel

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A WRIT OF CERTIORARI SHOULD BE ISSUED BECAUSE: (A) THERE IS A SPLIT BETWEEN THE FEDERAL CIRCUITS REGARDING THE INTERPRETATION AND APPLICATION OF THE CARJACKING STATUTE, (B) THE FEDERAL COURTS REQUIRE A FINAL RESOLUTION CONCERNING THE CORRECT STATUTORY CONSTRUCTION OF THE CARJACKING STATUTE, (C) THE EXPANSION OF THE EXPRESS ELEMENTS OF THE MENTAL CULPABILITY COVERED BY THE CARJACKING STATUTE TO INCLUDE CONDITIONAL INTENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW

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97-7164
Holloway

QUESTION PRESENTED

1. DOES THE COURT OF APPEALS HOLDING THAT CONDITIONAL INTENT IS INCLUDED WITHIN THE LEGAL DEFINITION OF SPECIFIC INTENT IN THE AMENDED CARJACKING STATUTE VIOLATE BOTH FUNDAMENTAL PRINCIPLES OF STATUTORY CONSTRUCTION AND PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW?

LIST OF PARTIES

The parties to the proceedings below were the United States of America and Francois Holloway a/k/a Abdu Ali. The parties before this Court on the instant petition are Francois Holloway a/k/a Abdu Ali and the United States of America.

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*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Second Circuit*

PETITION FOR WRIT OF CERTIORARI

Petitioner Francois Holloway a/k/a Abdu Masi Ali respectfully prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit which upheld Petitioner's conviction and appeal from a judgment of the United

States District Court, Eastern District of New York, (Gleeson, J.), entered on August 16, 1996. Petitioner was convicted following a jury trial of conspiracy to operate (18 U.S.C. §371) and the operation of a chop shop (18 U.S.C. §2322); three separate counts of carjacking; and three separate counts of the use of a firearm during a crime of violence (18 U.S.C. §924 (c) [1]).

OPINIONS BELOW

The District Court's opinion and decision to instruct the jury on the concept of conditional intent is reproduced in Appendix "A" and is reported at 921 F.Supp. 155, 160 (E.D.N.Y. 1996). The opinion of the Court of Appeals for the Second Circuit issued on September 16, 1997 upholding the District Court's determination and validating the concept of conditional intent is reproduced at Appendix "A" and is reported at 126 F.3d 82.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1997. No application has been made for an extension of time within which to file this petition. Petitioner seeks review of a decision rendered by a federal Court of Appeals. Thus, jurisdiction for this petition exists under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public

danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

18 U.S.C. §2119 (prior to the 1994 Amendments):

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --

1. be fined under this title or imprisoned not more than 15 years, or both
2. if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
3. if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amendment to the statute:

(14) CARJACKING. --Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting, "or sentenced to death."; and by striking "possession of a firearm as defined in section 921 of this title," and inserting, "with the intent to cause death or serious bodily harm".

Pub. L. 103-322, §60003(a)(14). With these revisions, the statute

now reads:

18 U.S.C. §2119 (1997)

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from a person or presence of another by force and violence or by intimidation, or attempts to do so, shall --

1. be fined under this title or imprisoned not more than 15 years, or both
2. if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
3. if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

STATEMENT OF THE CASE

The heart of the instant petition is the trial court's instruction to the jury on the concept of conditional intent.

At trial, the government's witnesses described petitioner's involvement in a number of charged carjackings. The evidence concerning all of the charged offenses, however, never revealed any specific intention on the part of petitioner to specifically cause serious injury to any of the victims of the crimes. The evidence as to each carjacking offense instead at most proved the intention to cause serious physical injury only in the event the victim refused to relinquish or resisted the taking of their vehicle.

Thus, although there were threats communicated in the course of a number of the offenses, the cooperating codefendant, Vernon Lennon, testified that the charged carjackings were all part of a plan to steal the victims' cars without harming the victims and that a gun would only be employed if one of the victims had given the perpetrators "a hard time" or had resisted.

At the conclusion of the evidence, Judge Gleeson charged the jury, over the objection of defense counsel on the doctrine of conditional intent and deemed it sufficient to satisfy the mental culpability required for the commission of the crime. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims refused to surrender their cars was sufficient to satisfy the specific intent requirement of the statute.

During their deliberations the jury requested that the court

recharge them on the legal definition of intent and in response the court again included the concept of conditional intent in its instructions to the panel. (The Court's charge and recharge on conditional intent is reproduced in the appendix).

On the basis of the trial court's conditional intent instructions, petitioner was found guilty of all eight counts of his indictment.

Following the verdict, petitioner moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. Petitioner argued that the court erred in charging the jury on conditional intent in view of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm as an express element of the crime. 18 U.S.C. §2119.

In a decision, issued on April 5, 1996, Judge Gleeson, denied petitioner's post-trial motion. On August 16, 1996, petitioner was sentenced and on August 28, 1996, judgment of conviction was entered.

On September 16, 1997, the Second Circuit Court of Appeals upheld petitioner's conviction and in a majority opinion held that the court's instruction on conditional intent was correct.

In a majority opinion written by District Judge Frederick J. Scullin of the Northern District of New York who was sitting by designation as a Judge of the Second Circuit, the court found that the concept of conditional intent to harm is included within the

definition of specific intent. Notwithstanding the absence of any precedent in federal law, Judge Scullin relied on state law and the Model Penal Code (which of course has never been adopted by the federal courts) as support for finding conditional intent to be included within the concept of specific intent.

Finally, although the majority opinion stated that it was not attempting to rewrite a poorly drafted statute, the court wrote, "Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the statute comports with the reasonable interpretation of the legislative purpose of the statute." (The majority and dissenting opinion is reproduced in the appendix).

In a carefully worded dissenting opinion, Judge Miner disagreed with the majority because he found no basis in the plain language of the statute or in its legislative history to support expanding the mental culpability required for the commission of the crime of carjacking to include conditional intent. Judge Miner instead reasoned that the language of the statute was clear and unambiguous, nor was there sufficiently persuasive information in the Congressional record to support a conclusion that the heightened intent requirement added by the 1994 amendments to the crime was an "unintended drafting error."

Moreover, Judge Miner wrote that even if the heightened intent requirement was an inadvertent legislative mistake, the Supreme Court has long held that "to supply omissions (to a statute) transcends the judicial function."

Finally, Judge Miner stressed that there is no basis in federal law which permits the expansion of specific intent to include the concept of conditional intent. The two are clearly different states of mind. Thus, despite assertions to the contrary, in finding that the carjacking statute encompassed the conditional intent to cause serious injury or death, the majority effectively redrafted the law.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI BECAUSE: (A) THERE IS A SPLIT BETWEEN THE FEDERAL CIRCUITS REGARDING THE INTERPRETATION AND APPLICATION OF THE CARJACKING STATUTE, (B) THE FEDERAL COURTS REQUIRE A FINAL RESOLUTION CONCERNING THE CORRECT STATUTORY CONSTRUCTION OF THE CARJACKING STATUTE, (C) THE EXPANSION OF THE EXPRESS ELEMENTS OF THE MENTAL CULPABILITY COVERED BY THE CARJACKING STATUTE TO INCLUDE CONDITIONAL INTENT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW.

The instant petition presents three compelling bases for the granting of a writ of certiorari. First, there exists a direct and inevitably growing conflict between the federal circuits concerning the correct interpretation of the federal carjacking statute. Second, Supreme Court review is required to resolve the important federal question as to the correct statutory construction of the amended federal carjacking law. Finally, the constitutional validity of the concept of conditional intent which heretofore has never existed as a principle of criminal liability in federal law needs to be resolved.

The Conflicts in the Circuit

In the instant case, the majority opinion held that the "specific intent to kill," reflected in 18 U.S.C. §2119 encompasses a conditional intent. The court ruled that the district court instruction to the jury that the petitioner could be convicted on a jury finding that he intended to cause death or serious physical injury to the victims of his crime in the event they resisted the taking of their vehicles was sufficient for conviction. In other words, the concept of conditional intent was presented to the jury

as an element of the crime and the Second Circuit Court of Appeals sustained such an instruction.

In sustaining the district court's injection of the concept of conditional intent, the Second Circuit Court of Appeals reasoned that conditional intent is a more culpable state of mind than a reckless one because it encompasses premeditation in the sense that the individual has considered the possibility that his victim may resist and if such a situation develops the defendant is prepared to seriously harm or kill them. A reckless state of mind constitutes an awareness of injury or death from the forcible taking of a vehicle which is disregarded by the perpetrator. The majority Second Circuit opinion reasons that such a state of mind constitutes a lesser culpable state than the thinking involved in a conditional intention.

The Second Circuit opinion in the instant case, however, recognizes that a conditional intent is still nevertheless different than specific intent and is inarguably not a specific intent or purposeful objective of the criminal act. Nevertheless, in finding that conditional intent is more than a reckless state of mind, the Second Circuit held that conditional intent is somehow included in the concept of specific intent.

The reasoning of the Second Circuit is flawed and inconsistent with the holding of the ninth circuit in United States v. Randolph, 93 F.3d 656, 660, 661 (9th Cir. 1997). The express language of 18 U.S.C. §2119 provides that the specific intent to cause death or bodily harm to the victim is an element of the crime of carjacking.

Thus, the Court in Randolph correctly recognized that to hold that conditional intent is somehow included in the statute is to ignore both the clear language and the unequivocal meaning of the statute.

The Ninth Circuit in United States v. Randolph, supra., found that Congress definitively provided that the specific intent to seriously harm or kill was an essential element of the crime and that consequently the legislature chose not to define the offense in the manner sustained by the Second Circuit. The lowering of the standard of criminal culpability allowed in the instant case by the Second Circuit was addressed and rejected by the Ninth Circuit.

The split in the Circuits does not, however, end here. The third circuit in United States v. Anderson, 108 F.3d 478, 482-483 (3d Cir. 1997), cert. denied 118 S.Ct. 123 (Oct. 6, 1997), and the tenth circuit in United States v. Romero, 122 F.3d 1334 (10th Cir. 1997), have also accepted the heretofore unprecedented federal criminal law concept of conditional intent and applied the carjacking statute in such a manner. Although the Supreme Court has recently denied a petition for certiorari in the Anderson case, it is respectfully submitted that the issue will continue to split the Circuits in future cases and can only be resolved by the intervention of the Supreme Court. Indeed, both prior and subsequent to the decision in Anderson, the issue has created division in the holdings of several district courts. United States v. Lake, 972 F.Supp. 328 (Dist. of the Virgin Islands, 1997) (upheld the concept of conditional intent); United States v. Craft, 1996 U.S. Dist. LEXIS 18964, 1996 WL 745527 (E.D. Pa. Dec. 23,

1996) (rejected the concept of conditional intent); United States v. Norwood, 948 F.Supp. 374, 377 (D.N.J. 1996) (upheld the concept of conditional intent).

The Substantial Question of Federal Statutory Construction

The correct construction and interpretation of the carjacking statute lies at the heart of the split between the circuits. The ninth Circuit in United States v. Randolph, supra., adhered to the express language and plain meaning of the amended car jacking statute and refused to extend its reach to crimes where the specific intent to cause serious bodily harm did not exist.

Notwithstanding the express language of the statute, however, as previously noted, the Second Circuit in the instant case has chosen to interpret the offense as containing conditional intent as an element of the crime.

As Judge Miner noted in his dissenting opinion, notwithstanding the statement in the majority opinion that the Court of Appeals (of the Second Circuit) "declines any invitation to redraft the statute," by finding a conditional intent implicit in the law, the court has unquestionably engaged in the prohibited exercise of judicial legislation.

The intent required for the commission of the crime is explicitly spelled out in the statute. Under such circumstances, where the plain meaning of a law is clear and unequivocal, the courts are precluded from adding to or reducing the scope of the law. Rubin v. United States, 449 U.S. 424, 430, 66 L.Ed2d 633, 101 S. Ct. 698 (1981); Consumer Prod. Safety Comm'n v. GTE Sylvania,

447 U.S. 102, 64 L.Ed.2d 766, 100 S.Ct. 2051 (1980); Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 (2d Cir. 1982), cert. denied 459 U.S. 833, 74 L.Ed.2d 73, 103 S.Ct. 74 (1982).

Nevertheless, the Second Circuit in the instant case, the Third Circuit in United States v. Anderson, supra., and Tenth Circuit in United States v. Romero, supra., have all ignored the first fundamental principle of statutory construction and stretched the law to encompass crimes where no specific intent to seriously injure exists and the most which can be found is the willingness to harm a victim if the taking of a vehicle is resisted.

The Second Circuit opinion in the instant case is also indefensible because even if the legislative process behind the amendment of the carjacking statute is analyzed there is a complete absence of determinative information in the Congressional record which reveals the motivation for discerning why the heightened element of the specific intent to cause serious harm or death was added to the statute. Indeed, since the possession of the weapon element of the offense was deleted by the 1994 amendments to the statute, a persuasive argument can be made that the specific intent requirement was added to the carjacking statute in order to provide some meaningful limit to the scope of what previously was only a state court crime.

The majority opinion in the instant case, however, has implicitly adopted a counter argument that Congress committed an unintended drafting error in amending the carjacking statute to contain a heightened specific intent to seriously harm or cause

death and that the only Congressional objective was to add a death penalty provision to the law and to eliminate the firearm requirement of the statute.

The Courts, however, have no authority to correct a perceived unintentional drafting error to make the law consistent with judicial speculation as to the truly desired but never legislatively expressed objectives of the law. Once again as Judge Miner recognized in his dissenting opinion, by adding a conditional intent element to the crime of carjacking the Second Circuit has ignored the teaching of the Supreme Court that "to supply omissions transcends the judicial function." See the dissenting opinion of Judge Miner; Iselin v. United States, 270 U.S. 245, 251, (1926), quoted in West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 101 (1991).

In rendering differing interpretations of the intent element of the carjacking statute, the federal courts are inconsistently interpreting and applying an important federal criminal statute. Moreover, in failing to adhere to the plain unequivocal language of the statute, several federal circuits have exceeded their authority and effectively usurped the legislative function.

It is respectfully submitted that a review by the Supreme Court is essential to reaffirm longstanding principles of statutory construction and to ensure that in the future the carjacking statute will be fairly and uniformly applied throughout the country.

The Due Process Question

In upholding the petitioner's conviction in the instant case, the Second Circuit has created a standard of criminal culpability which has never previously been recognized in federal law. The concept of conditional intent has no precedent in federal case law nor does it comport with recognized standards of criminal liability.

By holding that the concept of conditional intent to harm is encompassed within the definition of a specific intent to harm, the Second Circuit has indefensibly expanded the principles of criminal liability which exist in the federal courts. Indeed, there is no federal criminal statute which provides for conditional intent as an element of the crime nor is there a provision in the Federal Criminal Code which provides that the requirement of intent is satisfied by proof of conditional intent. Finally, as again noted in the carefully reasoned dissenting opinion of Judge Miner, there is no federal common law of crimes (see United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812)), state criminal law supplies no basis upon which to interpret a federal statute and the Model Penal Code has never been adopted by Congress.

In view of the foregoing facts, a legitimate precedential basis upon which to justify expanding the concept of specific intent to encompass a theory of conditional intent simply does not exist. The creation and implementation of such a novel theory of criminal liability in the instant case consequently clearly

violates fundamental principles of due process.

In short, the United States Constitution does not allow new concepts of criminal culpability to be created after the fact in order to punish conduct which would otherwise be beyond the reach of the federal system. Thus, it is respectfully submitted that Supreme Court review is essential in the instant case to prevent the present and future unconstitutional application of the carjacking statute and possibly to conduct additional federal crimes which is simply not the product of a statutorily proscribed state of mind.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 10, 1997

Respectfully Submitted,

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